MALAYSIAN REPORTS

Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 23-32-1986
PEH SWEE CHIN J
23 DECEMBER 1990

Civil Procedure — Consent order — Setting aside — Ground of mistake and fraud — Order not extracted or perfected — Preliminary point raised by defendant — Defendant argued plaintiff precluded from filing setting aside application — Whether court was functus officio — Whether the order was consent order — Meaning and significance of consent order — Rules of the High Court 1980, O 20 r 11

Civil Procedure — Order — Setting aside — Review of order by court — Order not perfected — Rules of the High Court 1980, O 20 r 11

Words and Phrases — 'Consent order'

The plaintiff obtained consent judgment which it executed on the same day issuing a prohibitory order in respect of a large number of pieces of land owned by the defendant. On 9 June 1989, the defendant applied by 'ex parte summons-in-chambers' that auction or sale of some 73 pieces of land as specified therein be postponed. The 'ex parte summons-in-chambers' was served on the plaintiff's solicitors on the morning of the hearing date, and the plaintiff's counsel told the court there that he agreed to the said application. On 24 June 1989 the plaintiff applied to set aside the order dated 9 June 1989 ('order in question') on the ground that the defendant had misled the plaintiff in that the 'alleged facts' in the supporting affidavit to the application for the order in question were false and meant to mislead. On the hearing to set aside the order in question, counsel for the defendant raised a preliminary point to be argued first. The point taken was that the plaintiff was precluded from filing the application to set aside, and that its remedy was to appeal to the Supreme Court. He also submitted that the court was functus officio. Counsel for the plaintiff contended that the order to be set aside was a consent order and since it had not been drawn up and perfected, it could be set aside on mistake or fraud. Counsel for the defendant argued that it was not a consent order.

Held, dismissing the plaintiff's application:

(1) An order not expressly stated to be a consent order should not be treated as a consent order and a court would have to be satisfied if it was really one when it was so alleged. The circumstances of this case indicated a total lack of premeditation of both parties in advance for a consent order or compromise. Thus, the court found most probably that the order in question was not a consent order.

(2) Before an order has been perfected, the court has inherent jurisdiction to review the matter. This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent. When an order is extracted or perfected, the court can still review the same but only with the consent of both parties, or as expressly provided by the Rules of the High Court 1980.

(3) As regards the power of reconsidering the order in question, which had not been extracted and not a consent order, the court was of the view that the nature of this power is not a blanket one; it is subject to a restriction, which is to correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O 20 r 11 of the Rules of the High Court 1980. If such restriction does not exist, it will somewhat destroy the fabric of the principle that there should be finality in litigation.

(4) The order in question in this instant case that was sought to be set aside on ground of misapprehension, mistake or fraud and being an unperfected consent order, was certainly not within the scope of the power to rehear having regard to the grounds stated in the application. The court therefore exercised its discretion in refusing to rehear and reopen the case relating to the order in question on the grounds of mistake, misappropriation etc.

(5) The proper remedy would have been the lodging of an appeal within 30 days from the date of the order in question, ie from 9 June 1989. It was not correct to say that the court was functus officio when faced with the present application to set aside the order in question, as the order in question had not yet been perfected, and the court would hear it subject to the restriction explained above.

[Bahasa Malaysia summary

Plaintif telah memperolehi satu penghakiman persetujuan dan melaksanakannya pada hari yang sama dengan mengeluarkan satu perintah larangan berkenaan beberapa bidang tanah kepunyaan defendan. Pada 9 Jun 1989, defendan memohon melalui 'saman dalam kamar ex parte' supaya perlelongan atau jualan 73 bidang tanah seperti yang dinyatakan di dalamnya ditangguhkan atas alasan yang ia telah menjumpai 73 orang pembeli bagi 73 buah rumah yang telah didirikan atau akan didirikan di atas 73 bidang tanah itu 'Saman dalam kamar ex parte' itu telah disampaikan kepada peguam plaintif pada pagi hari pembicaraan, dan peguam plaintif memberitahu mahkamah bahawa beliau bersetuju kepada permohonan itu. Pada 24 Jun 1989 plaintif memohon untuk mengetepikan perintah bertarikh 9 Jun 1989 ('perintah berkenaan') atas alasan defendan telah mengelirukan plaintif, iaitu 'fakta-fakta yang didakwa' di dalam afidavit sokongan kepada permohonan untuk perintah berkenaan adalah palsu dan bertujuan membawa kekeliruan. Pada pembicaraan untuk mengetepikan perintah berkenaan, peguam defendan membangkitkan satu isu permulaan untuk dihujah terlebih dahulu. Isu itu ialah plaintif ditahan daripada membuat permohonan untuk mengetepikan, dan remedinya ialah untuk merayu ke Mahkamah Agung. Beliau juga menghujah bahawa mahkamah adalah functus officio. Peguam plaintif menghujah bahawa perintah yang hendak diketepikan itu adalah satu perintah persetujuan dan memandangkan yang ia belum digubal dan disempurnakan, ia boleh diketepikan atas alasan silap atau fraud. Peguam defendan menghujah bahawa ia bukan perintah persetujuan.

Diputuskan, menolak permohonan plaintif:

(1) Satu perintah yang tidak disebut dengan nyata sebagai perintah persetujuan tidak harus disifatkan sebagai perintah persetujuan dan mahkamah mesti berpuas hati bahawa ia sememangnya satu perintah sedemikian apabila dakwaan begitu dibuat. Keadaan kes ini menunjukkan bahawa keduadua pihak tidak sama sekali memikirkan terlebih dahulu tentang perintah persetujuan atau kompromi. Jadi, mahkamah mendapati bahawa mungkin sekali perintah berkenaan bukan satu perintah persetujuan.

(2) Sebelum satu perintah disempurnakan, mahkamah mempunyai bidang kuasa sedia ada untuk mengkaji semula perkara itu. Kuasa ini boleh dijalankan sama ada atau tidak perintah itu dibuat di mahkamah terbuka atau di dalam kamar, atau sama ada perintah itu melalui persetujuan. Apabila satu perintah dipetik dan disempurnakan, mahkamah masih boleh mengkaji semula perintah itu tetapi cuma dengan persetujuan kedua-dua pihak, atau seperti diperuntukkan dengan nyata oleh Kaedah-Kaedah Mahkamah Tinggi 1980.

(3) Berkenaan kuasa mempertimbangkan semula perintah yang disoal di sini, yang belum dipetik dan bukan satu peritah persetujuan, mahkamah berpandangan yang sifat kuasa ini bukanlah secara menyeluruh; ia tertakluk kepada satu had, iaitu untuk membetulkan satu kesilapan dalam perintah itu sendiri di mana perintah yang dibuat tidak menyatakan tujuan nyata mahkamah dalam perkara itu, atau dalam perkataan lain, ia tidak mengikut tujuan nyata mahkamah yang sedemikian. Kuasa itu tidak membenarkan mahkamah membuat satu perintah yang pada asasnya berlainan. Kuasa itu dijalankan bersama dengan kuasa nyata untuk membetulkan satu kesilapan kerani, atau apa-apa kesilapan yang berbangkit daripada kesalahan tak sengaja atau ketinggalan seperti yang diperuntukkan secara nyata oleh A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980. Jika had sedemikian tidak wujud, ia akan merosakkan prinsip bahawa mestilah ada keputusan muktamad dalam litigasi.

(4) Perintah yang disoal di dalam kes ini yang hendak diketepikan atas alasan kekeliruan, silap atau fraud dan (bukan satu perintah yang belum disempurnakan), jelas bukan dalam lingkungan kuasa untuk mendengar semula, berpandukan alasan-alasan yang dinyatakan di dalam permohonan itu. Mahkamah oleh itu menjalankan budibicaranya dan enggan mendengar semula atau membuka kembali kes berkenaan perintah yang disoal atas alasan silap, kekeliruan, dsb.

(5) Remedi yang betul adalah membuat rayuan dalam masa 30 hari dari tarikh perintah itu, iaitu dari 9 Jun 1989. Adalah tidak betul untuk berkata bahawa mahkamah itu functus officio apabila berdepan dengan permohonan untuk mengetepikan perintah yang disoal itu, kerana perintah itu belum disempurnakan dan mahkamah akan mempertimbangkannya tertakluk kepada had yang diterangkan di atas.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-405-90.]

Cases referred to

1 *Malayan United Finance Bhd* v *Noormurni Sdn Bhd* [1988] 1 MLJ 395 (refd)
2 *SCF Finance* v *Masri* [1987] 1 All ER 194 (refd)
3 *Tan Yew* v *Seow Fook Meng* [1989] 2 MLJ (refd)
4 *Huddersfield Banking Co Ltd* v *Henry Lister & Son* [1895] 2 Ch D 273 (distd)
5 *Jonesco* v *Beard* [1930] AC 298 (refd)
6 *Re Harrison's Shares* [1955] Ch D 260 (refd)
7 *Hock Hua Bank Bhd* v *Sahari bin Murid* [1981] 1 MLJ 143 (refd)
8 *Chandless-Chandless* v *Nicholson* [1942] 2 KB 321 (folld)
9 *Re Harrison's Settlement* [1955] 1 All ER 185 (refd)
10 *Re St Nazaire Co* (1879) 12 Ch D 88 (refd)
11 *Re Thomas* [1911] 2 Ch 389 (refd)
12 *Chua Wah Keow* v *Ng Ho Huat* [1961] MLJ 321 (refd)
13 *Ladd* v *Marshall* [1954] 3 All ER 745 (refd)
14 *Holt* v *Jesse* (1876) 3 Ch D 177 (refd)
15 *Hickman* v *Berens* [1895] 2 Ch D 638 (refd)
16 *Shepherd* v *Robinson* [1919] 1 KB 474 (refd)
17 *Hatton* v *Harris* [1892] AC 547 (refd)
18 *Tung Lieng (Penang) Trading Co Sdn Bhd* v *Liew Cheong Thye* [1986] 2 MLJ 197 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 9, O 14 r 11, O19 r 9, O 20 r 11, O 56 r 2(2)

Ng Seng Lee for the plaintiff.
Azzat Kamaludin for the defendant.

Cur Adv Vult

Peh Swee Chin J: To cut the story short, the plaintiff obtained consent judgment for a sum of $69,000 with interest and costs.

The plaintiff began to execute the judgment and pursuant to it, a prohibitory order was issued at its behest in respect of a large number of pieces of land owned by the defendant.

On 9 June 1989, the defendant applied by 'ex parte summons-in-chambers' that auction or sale of some 73 pieces of land as specified therein be postponed on the ground that it had found 73 purchasers in respect of 73 houses built or to be built on 73 pieces of land. For reasons which will become apparent later, it would not be essential to set out detailed grounds.

Though it started as an 'ex parte summons-in-chambers', it was served on the plaintiff's solicitors. It came up for hearing before another learned judge in Court 2 and learned counsel for the plaintiff told the court there that he agreed to the said application. On 9 June 1989 the order was then made.

On 24 June 1989 the plaintiff applied to set aside the order dated 9 June 1989 made earlier (hereafter called 'the order in question') on the ground that the defendant had misled the plaintiff in that the 'alleged facts' in the supporting affidavit to the application for the order in question were false and meant to mislead.

On the hearing before me to set aside the order in question (in Court 1), learned counsel for the defendant raised a preliminary point to be argued first, apparently with no objection from the plaintiff. The point taken was that the plaintiff was precluded from filing the application to set aside, and that its remedy was to appeal to the Supreme Court. Learned counsel cited *Malayan United Finance Bhd* v *Noormurni Sdn Bhd*[1] and *SCF Finance* v *Masri*.[2] He submitted that the court was functus officio. Learned counsel further stressed that if the court dismissed his preliminary point, he would ask for an adjournment to prepare the case on the question of the the merits of the application to set aside the order in question, which could be heard later.

Learned counsel for the plaintiff submitted that the order to be set aside was a consent order and since it had not been drawn up and perfected, it could be set

aside on the grounds of mistake or fraud. He cited *Tan Yew* v *Seow Fook Meng*[3] — for the proposition that a consent order, which was not perfected, could be set aside. He cited *Huddersfield Banking Co Ltd* v *Henry Lister & Sons;*[4] *Jonesco* v *Beard;*[5] *Re Harrison's Shares.*[6]

In reply, learned counsel for the defendant informed the court that the colleague who previously handled this matter in Court 2 when the order in question was made, had said it was not a consent order. Learned counsel had asked earlier for an adjournment to find out from the said colleague as to whether it was a consent order. When the hearing resumed on a subsequent day, he so informed the court; a statement from the Bar table was tendered which the learned counsel for the plaintiff had not raised any objection to.

In my view, the crux of the matter was whether the order dated 9 June 1989, and sought to be set aside by the plaintiff, was a consent order or not. Learned counsel for the plaintiff said it was a consent order, but learned counsel for the defendant said it was not a consent order based on information supplied by a former colleague of his who appeared at the hearing in which the order in question was made. When learned counsel for the defendant informed the court of what he had found out from his colleague of what had happened, ie it was not a consent order, learned counsel for the plaintiff did not raise the slightest objection and that could mean in my view, at the very least, that the right to insist on a formal affidavit from that said previous colleague about what had happened had been waived. Thus, no conclusion could be arrived at merely on counsel's opposing assertions: the court would have to look further.

In my view, it has been recognized for a long time that there is clear, though subtle distinction, between a consent order and an order to which the other side or counsel merely submits or offers no objection. The consequences of a consent order are peculiar to it, eg a consent order cannot be appealed from without leave; or that a consent order (when perfected) can be set aside in a separate action filed for that purpose: see *Huddersfield Banking Co Ltd* v *Henry Lister,*[4] and *Hock Hua Bank Bhd* v *Sahari bin Murid.*[7]

The practice in our courts, if my experience is anything to go by, representative of the general practice, seems to be that either both parties appear and present a draft of consent order or judgment duly signed by both asking the court to have it recorded, or both parties have the terms of a consent order dictated to the court for recording purposes.

The meaning or technical meaning of a consent order was explained with great lucidity by Lord Greene, Master of Rolls in *Chandless-Chandless* v *Nicholson,*[8] at p 324, his Lordship said:

> The original order which Master Ball made is not on its face expressed to be a consent order, and if it was a consent order it can only have been by a very regrettable mistake or inadvertance that that circumstance was not expressed in it. If an order is made by consent the practice should invariably be that it should on the face of it be expressed so to have been made. When the court finds an order which is not expressed to be made by consent it certainly is not going to treat it as a consent order unless it is satisfied that it was in fact a consent order. In the present case I am left in considerable doubt whether this order was a consent order in the strict sense. There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression, and I am not the least bit satisfied, having regard to the conflicting statements which we have before us as to how this order came to be drawn up, that it was a consent order in the technical sense. I cannot help thinking that at the time he made that order Master Ball cannot have so regarded it, because it is impossible to think that so learned and experienced a master, when he was making a consent order, should have disregarded what I apprehend is the universal practice of expressing on the face of the order that it is a consent order.

In my view, from the passage of the learned Master of the Rolls, an order not expressly stated to be a consent order should not be treated as a consent order and a court would have to be satisfied if it was really one when it is so alleged.

Reading between the lines in the said passage, the first step would obviously be to give prima facie effect to the wording of the order itself.

In this case, the order was stated in the minutes of the court file to be a 'PSD', the abbreviation of the Malay words: 'Perentah seperti dipohon', ie 'Order in terms'. Thus prima facie it was not a consent order. The said minutes contained the names of both counsel, who appeared at the hearing in which the order in question was made.

I have obtained a transcript of the notes of proceedings in respect of the prior hearing in which the order was made, and it is as follows:

> CS 23-32-86 (Lampiran 430)
>
> Encik Ng SL mewakili plaintif
> Encik Anthony Ng mewakili defendan
>
> Peg plaintif:
>
> Peguam defendan telah memfailkan satu permohonan hari ini (lampiran 44). Saya ingin menjawab permohonan tersebut. Saya pohon penangguhan pendek. Penghakiman telah diambil pada Mei 1986 dan belum mendapat apa-apa balik.
>
> Peg defendan:
>
> Permohonan saya dibawah O 47 r 7. Penguam plaintif tidak mungkin boleh mendapat menjawab permohonan ini. Wang dari penjualan akan diberi kepada plaintif.
>
> Peg plaintif:
>
> Kalau wang diberi kepada kita, kami bersetuju.

Lampiran 44 — PSD

Lampiran 43 — Peguam plaintif minta tangguh 2 bulan.

Kepada 25.8.89.

(TT) Dato' Abdul Malek
9.6.89

The circumstances that could also throw some light were that according to learned counsel for plaintiff, on the morning of the hearing of the summons on which the order in question was made, the summons was served on him just before the hearing, and after reading the supporting affidavit for the said summons, he agreed 'to the order in question'. One considered the transcript of the notes of proceedings. These circumstances indicated a total lack of premeditation of both parties in advance for a consent order or compromise and most probably, indicated a submission by learned counsel for the plaintiff to the order in question. The distinct impression the court obtained was the plaintiff had hoped to benefit from the order and the defendant had found subsequently that such order was financially onerous and was attempting to get rid of it. Thus, I found most probably that the order in question was not a consent order.

Now, a very significant factor which was not in dispute was that the order in question had never been extracted and perfected. This factor made a great deal of difference.

In my view, before an order has been perfected, the court has inherent jurisdiction to review the matter. Please see *Re Harrison's Settlement*,[9] *Re St Nazaire Co*,[10] *Re Thomas*,[11] *Chua Wah Keow* v *Ng Ho Huat*.[12] This power is exercisable whether it is an order made in open court or in chambers, or whether order is by consent; please see *Huddersfield Banking Co Ltd* v *Henry Lister*,[4] or otherwise so long the order has not been perfected, ie drawn up, passed and entered. I may just as well mention that when an order is extracted or perfected, the court can still review the same but only with the consent of both parties, or as expressly provided by the Rules of the High Court 1980 to give a few examples, in cases of setting aside judgment in default of appearance under O 13 r 9; setting aside judgment in default of pleadings under O 19 r 9; setting aside judgment in default of appearance at the hearing under O 14 r 11; or under O 20 r 11 where the order does not correctly set out the manifest intention of the court. The examples given are only a few of the examples to be found in the Rules of the High Court 1980.

To revert to the instant case, the order in question had not been extracted or perfected, but as regards the power of re-considering it, the order in question not being a consent order, what would be actually the nature of such power to be exercised?

This court was much exercised by this problem. In my view, the nature of this power is not a blanket one; it is subject to a restriction which is, to correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O 20 r 11 of the Rules of the High Court 1980.

In arriving at my view I adopted a passage in *Chua Wah Keow*,[12] in which the late Tan Ah Tah J (as he then was) said at p 322 as follows:

> The principle relating to the power of a judge to recall an unperfected order is stated by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185 in the following terms (at p 188):
>
> > 'We think that an order pronounced by the judge can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered.'
>
> It may perhaps be argued that the principle, laid down as it is in such wide terms, confers upon a judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

The Court of Appeal in *Chua Wah Keow*[12] held that the trial judge's exercise of the inherent power in that case was not a correct exercise when the trial court, after dismissing the claim, recalled the matter (as the order was found not to have been perfected) to allow the plaintiff to amend his statement of claim and after further argument, gave judgment against the defendant, doing an 'about-turn'. Therefore his Lordship did not pay mere lip-service when indicating that the power (to recall or re-hear) was not as untrammelled as it appeared to be. The Court of Appeal there did not think there was any doubt regarding the corrections of the first order which dismissed the plaintiff's claim with costs.

If such restriction does not exist, it will also somewhat destroy the fabric of the principle that there should be finality in litigation, for otherwise, the court may decide this way today and it may recall the parties and after further argument, decide in the opposite way tomorrow as was done in *Chua Wah Keow*,[12] this would somewhat bring some disrepute to the court unless such a radical change is expressly authorized by any other written law such as follows.

Thus, under O 56 r 2(2) of the Rules of the High Court 1980, from the time of the making of an order in

chambers by the judge, any party dissatisfied with it may apply to the registrar to have the matter adjourned into open court for further argument (but without further evidence being allowed except in accordance with *Ladd* v *Marshall*[13]). This, in my view, would represent a continuation of the chambers proceedings giving an opportunity to parties to present further argument to persuade the judge to come round to a different decision, including a diametrically opposite decision, on account perhaps of the hurried nature of chambers proceedings.

Having stated the above matters, in my view, the order in question in this instant case that was sought to be set aside on ground of misapprehension, mistake or fraud and being an unperfected consent order, was certainly not within scope of the power to rehear having regard to the grounds stated in the application. I therefore exercised my discretion in refusing to rehear and reopen the case relating to the order in question on the grounds of mistake, misapprehension etc.

If however, the order in question had been a consent order which had not been perfected, this would have been on a different footing altogether and I would not rehear the matter on the ground of mistake etc in order to decide whether I should withdraw or set aside the order in question as asked as was done in *Holt* v *Jesse*,[14] *Hickman* v *Berens*,[15] *Shepherd* v *Robinson*.[16] It was decided in *Huddersfield Banking Co Ltd* v *Henry Lister*,[4] to the effect that a consent order can be set aside in a separate action commenced for that purpose on any ground (not necessarily limited to mistake only) that would normally invalidate an agreement such as want of consideration, mistake, fraud, undue influence etc. In that case, the consent order had been perfected, unlike our instant case, hence a separate action had to be filed and was filed. In my view, such grounds would also and equally be available to the plaintiff if the order in question in the instant case was a consent order which had not been drawn up, passed and entered.

The proper remedy would have been the lodging of an appeal within 30 days from the date of the order in question, ie from 9 June 1989. It was not correct to say that the court was functus officio when faced with the present application to set aside the order in question, as the order in question had not yet been perfected, and the court would hear it subject to the restriction explained above. If the order in question had been perfected, the court would still not be functus officio, for the court would still have power to amend it by virtue of the slip rule, ie O 20 r 11 of the Rules of the High Court 1980. There does not seem to be any time limit under O 20 r 11. In *Hatton* v *Harris*,[17] Lord MacNaghten said 'Lapse of time has nothing to do with the matter' when amending and correcting an error in judgment given in 1853 on 27 June 1892.

Just to give another example, an unperfected order was made on 16 December 1910 and amended or corrected on 24 April 1911, in *Re Thomas*.[11]

A court only loses all power to amend an order and is functus officio when a judge issues a certificate requiring no further argument, under O 56 r 2(2) of the Rules of the High Court 1980; please see the decision of the Supreme Court in *Tung Lieng (Penang) Trading Co Sdn Bhd* v *Liew Cheong Thye*.[18] In our instant case, no question of such a certificate was involved in connection with the order in question.

I therefore dismissed with costs the application by the plaintiff to set aside the order in question.

Application dismissed.

Solicitors: *Yeoh Kian Teik & Co; Chua Brothers Azzat & Xavier.*

Reported by *Eunice Lee Fei Fong*